No. 86-1636

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CADWALADER, WICKERSHAM & TAFT,
Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,
Nominal Respondent,

- and -

DANIEL M. GOTTLIEB,
Real Party in Interest.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF FOR THE PETITIONER	1
I. CADWALADER'S CLAIMS OF PRIVILEGE ARE PROPERLY BEFORE THIS COURT AND WARRANT THE ISSUANCE OF MANDAMUS	2
II. THE DECISION OF THE DISTRICT COURT WAS CLEARLY ERRONEOUS	5
A. The District Court Erred When It Failed To Examine The Documents *In Camera*	6
B. The Crime-Fraud Exception Was Incorrectly Applied	6
C. The Joint-Client Exception Is Inapplicable	9
CONCLUSION	10

TABLE OF AUTHORITIES

CASES Page

AM International, Inc. v. *Eastman Kodak Co.*, 100 F.R.D. 255 (N.D. Ill. 1981) 4
Barclaysamerican Corp. v. *Kane*, 746 F.2d 653 (10th Cir. 1984) 2
Bogosian v. *Gulf Oil Corp.*, 738 F.2d 587 (3d Cir. 1984) 2, 3
Broad v. *Rockwell International Corp.*, [1976-77 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,894 (N.D. Tex. 1977) 10
Coastal Corp. v. *Duncan*, 86 F.R.D. 514 (D. Del. 1980) 3
Deering Milliken Research Corp. v. *Tex-Elastic Corp.*, 320 F. Supp. 806 (D. So. Car. 1970) 4
Federal Trade Commission v. *Shaffner*, 626 F.2d 32 (7th Cir. 1980) 4
Garner v. *Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970), *cert. denied*, 401 U.S. 974 (1971) 8, 9, 10
In re Grand Jury Proceeding (Schofield), 721 F.2d 1221 (9th Cir. 1983) 3
In re Grand Jury Witness (Salas), 695 F.2d 359 (9th Cir. 1982) 3
Harper & Row Publishers, Inc. v. *Decker*, 423 F.2d 487 (7th Cir. 1970), *aff'd per curiam*, 400 U.S. 348 (1971) 2
Heathman v. *United States District Court for the Central District of California*, 503 F.2d 1032 (9th Cir. 1974) 2
In re International Systems and Controls Corporation Securities Litigation, 693 F.2d 1235 (5th Cir. 1982) 7
Jenkins v. *Weinshienk*, 670 F.2d 915 (10th Cir. 1982) 2
In re John Doe Corp., 675 F.2d 482 (2d Cir. 1982) .. 7
Kerr v. *United States District Court for the Northern District of California*, 426 U.S. 394 1976) .. 3
New York Dock Co. v. *Steamship Posnan*, 274 U.S. 117 (1927) 8

TABLE OF AUTHORITIES—Continued

	Page
Northrop Corp. v. *McDonnell Douglas Corp.*, 751 F.2d 395 (D.C. Cir. 1984)	6
Panter v. *Marshall Field & Co.*, 80 F.R.D. 718 (N.D. Ill. 1978)	10
Renfield Corp. v. *E. Remy Martin & Co.*, 98 F.R.D. 442 (D. Del. 1982)	6
Schlagenhauf v. *Holder*, 379 U.S. 104 (1964)	2
Securities & Exchange Commission v. *Dresser Industries, Inc.*, 453 F. Supp. 573 (D. D.C. 1978), *aff'd*, 628 F.2d 1368 (D.C. Cir.), *cert. denied*, 449 U.S. 993 (1980)	4
In re Sentinel Financial Instruments, 553 F. Supp. 71 (S.D.N.Y.), *aff'd mem.*, 714 F.2d 113 (2d Cir. 1982), *cert. denied*, 459 U.S. 1208 (1983)	8
In re Sentinel Government Securities, 530 F. Supp. 793 (S.D.N.Y.), *petition for mandamus denied*, 697 F.2d 297 (2d Cir.), *cert. denied*, 456 U.S. 977 (1982)	8
In re Shopping Carts Antitrust Litigation, 95 F.R.D. 299 (S.D.N.Y. 1982)	4
Shirvani v. *Capital Investing Corp., Inc.*, 112 F.R.D. 389 (D. Conn. 1986)	9
In re Special September 1983 Grand Jury, 608 F. Supp. 538 (S.D. Ind.), *aff'd*, 776 F.2d 628 (7th Cir. 1985)	4
Stix Products, Inc. v. *United Merchants & Mfrs., Inc.*, 47 F.R.D. 334 (S.D.N.Y. 1969)	4
United States v. *Exxon Corp.*, 87 F.R.D. 624 (D. D.C. 1980)	5
United States v. *Robertson*, 706 F.2d 253 (8th Cir. 1983)	2
United States v. *Tratner*, 511 F.2d 248 (7th Cir. 1975)	4
United States v. *West*, 672 F.2d 796 (10th Cir.), *cert. denied*, 457 U.S. 1133 (1982)	2
Valente v. *Pepsico, Inc.*, 68 F.R.D. 361 (D. Del. 1975)	10

TABLE OF AUTHORITIES—Continued

Page

Washington-Baltimore Newspaper Guild Local 35 v. *Washington Star Co.*, 543 F. Supp. 906 (D. D.C. 1982) 10

Weil v. *Investment/Indicators, Research & Management, Inc.*, 647 F.2d 18 (9th Cir. 1981) 8

STATUTES AND RULES

California Corporations Code Sec. 25110 (West 1977) 8

Federal Rules of Civil Procedure, Rule 34 3

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REPLY BRIEF FOR THE PETITIONER

Petitioner Cadwalader, Wickersham & Taft ("Cadwalader") respectfully submits this Reply Brief in further support of its petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

In his brief, third-party defendant and real party in interest Daniel M. Gottlieb ("Gottlieb")[1] argues basically

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[1] Gottlieb's brief purports to be submitted on behalf of himself and plaintiff Allan Carr ("Carr"). Yet, the document request and

two points: (1) that the issues presented by Cadwalader's petition are not properly before this Court, and (2) that the decision of the court below was not clearly erroneous. Both arguments are without merit.

I

CADWALADER'S CLAIMS OF PRIVILEGE ARE PROPERLY BEFORE THIS COURT AND WARRANT THE ISSUANCE OF MANDAMUS

Gottlieb argues that discovery orders involving claims of privilege enjoy no special status in considering an application for a writ of mandamus. Yet, the law is clear that mandamus should issue where, as here, the petitioner shows that an order will escape effective appellate review at a later date and disclosure involves questions of substantial importance to the administration of justice. *Barclaysamerican Corp.* v. *Kane*, 746 F.2d 653, 655 (10th Cir. 1984); *Bogosian* v. *Gulf Oil Corp.*, 738 F.2d 587, 591 (3d Cir. 1984) (and cases cited therein); *Heathman* v. *United States District Court for the Central District of California*, 503 F.2d 1032, 1033 (9th Cir. 1974). *See Schlagenhauf* v. *Holder*, 379 U.S. 104, 110 (1964). In cases involving privilege, disclosure generally makes meaningful review impossible at a later date because after disclosure the privilege is irretrievably lost. *United States* v. *West*, 672 F.2d 796, 799 (10th Cir.), *cert. denied*, 457 U.S. 1133 (1982); *Jenkins* v. *Weinshienk*, 670 F.2d 915, 917 (10th Cir. 1982); *Harper & Row Publishers, Inc.* v. *Decker*, 423 F.2d 487 (7th Cir. 1970),

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the motion to compel at issue were filed on behalf of *Gottlieb*, and Gottlieb alone. Notwithstanding his relationship to Carr, Gottlieb is himself a third-party defendant in this action. Hence, it is Gottlieb's right to these documents which is at issue in this proceeding. Any claimed right of *Carr* to the documents was never raised in or addressed by the court below and is not properly before this Court. *See United States* v. *Robertson*, 706 F.2d 253, 255 (8th Cir. 1983).

aff'd per curiam, 400 U.S. 348 (1971); *Bogosian* v. *Gulf Oil Corp., supra.* Important questions are raised in this case regarding the scope of the attorney-client privilege in civil litigation following a criminal conviction.

Gottlieb next argues that Cadwalader's claim of privilege should not be considered by this Court because Cadwalader did not submit an index of the documents as to which privilege was asserted and because it did not actually deliver the documents for inspection by the lower court *in camera.* On the latter point, the record is clear that Cadwalader offered the documents to the district court for inspection. *See* Petition at 5 n.2; Brief In Opposition at 24.

Under the circumstances of this case, an index was unnecessary and Cadwalader's failure to provide such an index clearly was not the basis asserted by either the magistrate or the district court for determining that the documents were not privileged. *See* Petition, Appendix A & C. Neither the Federal Rules of Civil Procedure nor the Local Rules for the Central District of California require an index or other specific identification of privileged documents before a privilege can properly be asserted. *See* Fed. R. Civ P. 34. The purpose of a list of privileged documents is to provide the court with sufficient information from which it can reasonably conclude whether or not a privilege applies, *i.e.*, that the communication involved legal advice between a client and his attorney. *Coastal Corp.* v. *Duncan*, 86 F.R.D. 514, 521 (D. Del. 1980); *In re Grand Jury Proceeding (Schofield)*, 721 F.2d 1221, 1223 (9th Cir. 1983); *In re Grand Jury Witness (Salas)*, 695 F.2d 359, 362 (9th Cir. 1982).

As this Court noted in *Kerr* v. *United States District Court for the Northern District of California*, 426 U.S. 394, 400 (1976), the party claiming a privilege must merely specify which "documents or *class of documents* are privileged" (emphasis added). Gottlieb requested

whole classes of documents which were prima facie privileged including, for example, all documents containing communication between Senft and Cadwalader (Request Nos. 1, 2, 3) and all documents reflecting representations made by Sentinel to Cadwalader in connection with the preparation of the Private Placement Memorandum (Request No. 23). It requires no identification of specific documents to conclude that these requests call for production of a *class* of privileged documents reflecting communication between an attorney and his client relating to legal advice.[2]

Even the cases relied upon by Gottlieb do not require a listing of documents where documents are sought from an attorney and involve communications with the attorney's client. *See Federal Trade Commission* v. *Shaffner*, 626 F.2d 32, 37 (7th Cir. 1980); *In re Shopping Carts Antitrust Litigation*, 95 F.R.D. 299, 306 (S.D.N.Y. 1982) ("it must be remembered that these interrogatories were directed at the corporate defendants and not to their attorneys"). In *Securities & Exchange Commission* v. *Dresser Industries, Inc.*, 453 F. Supp. 573 (D. D.C. 1978), *aff'd*, 628 F.2d 1368 (D.C. Cir), *cert. denied*, 449 U.S. 993 (1980), and *AM International, Inc.* v. *East-*

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[2] In circumstances involving a discovery request to an attorney, courts have noted that requiring an index with date and subject matter may defeat the purpose of the privilege, by requiring the disclosure of confidential information, such as the general nature of the communication or when an attorney and a client consulted about a given matter. *See Deering Milliken Research Corp.* v. *Tex-Elastic Corp.*, 320 F. Supp. 806, 809 (D. So. Car. 1970); *Stix Products, Inc.* v. *United Merchants & Mfrs., Inc.*, 47 F.R.D. 334, 339 (S.D.N.Y. 1969) (rejecting need for index). In circumstances where an index may itself reveal privileged information, *in camera* review by the court becomes particularly important, *id.*, *United States* v. *Tratner*, 511 F.2d 248, 252 (7th Cir. 1975), and submission of the documents *in camera* rather than an index is the appropriate procedure following a blanket claim of privilege. *See In re Special September 1983 Grand Jury*, 608 F. Supp. 538, 542 (S.D. Ind.), *aff'd*, 776 F.2d 628 (7th Cir. 1985).

man Kodak Co., 100 F.R.D. 255, 257 (N.D. Ill. 1981), also cited by Gottlieb, the courts rejected a blanket assertion of privilege because the corporate witness (not an attorney) had failed to show that any specific materials were subject to privilege or that the materials were generated for the purpose of securing legal advice. Even the index discussed in *United States* v. *Exxon Corp.*, 87 F.R.D. 624, 637 (D. D.C. 1980), relied upon by Gottlieb, required only the source of communication, whether the communication occurred in confidence and whether the source was an attorney. There is no dispute that each of the categories or classes of documents at issue here were confidential communications to or from an attorney.

In sum, the claims of privilege were properly asserted by Cadwalader in the district court.

II

THE DECISION OF THE DISTRICT COURT WAS CLEARLY ERRONEOUS

The decisions of the magistrate and the district court were as clear and unambiguous as they were erroneous. The magistrate concluded that the Cadwalader documents requested by Gottlieb must be produced, even though privileged, simply because they appeared relevant and Gottlieb had a need for them. This was plainly error. The district court did not address these conclusions but instead found that the crime-fraud and joint-client exceptions abrogated any privilege. On the record and the law this was equally incorrect. Moreover, neither court reviewed these documents *in camera*, notwithstanding the offer by Cadwalader to make them available.[3]

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[3] Contrary to Gottlieb's assertions (Brief in Opposition at 6 n.3) at no point did Cadwalader refuse to make any or all of the privileged documents available for review by the magistrate or the district court. *See also* p. 3, *supra*.

A. The District Court Erred When It Failed To Examine The Documents In Camera

Gottlieb ignores the decisions of this Court and of at least four circuits which establish that the district court should have reviewed the documents *in camera* before authorizing their disclosure. Petition at 7-11. Rather, he relies on a series of cases which are inapposite.

Renfield Corp. v. *E. Remy Martin & Co.*, 98 F.R.D. 442, 445 (D. Del. 1982) holds only that a party *opposing* a claim of privilege has no right to an *in camera* inspection where the party asserting privilege files an unrebutted affidavit setting forth the facts establishing the privilege. Clearly, that case is of no import here. Similarly, *Northrop Corp.* v. *McDonnell Douglas Corp.*, 751 F.2d 395 (D.C. Cir. 1984), holds that a court need not examine *in camera* documents as to which the state secrets privilege is asserted before determining that documents should *not* be disclosed. Neither of these cases contradicts the authorities holding that *in camera* review should be undertaken prior to disclosure of documents as to which the attorney-client privilege is asserted. *See* Petition at 7-11.

B. The Crime-Fraud Exception Was Incorrectly Applied

In arguing that the district court properly applied the crime-fraud exception, Gottlieb ignores the numerous and uniform authorities which establish that a party seeking to rely on the crime-fraud exception must satisfy both parts of a two-pronged test, demonstrating: (1) that there is prima facie evidence that a crime or fraud has been committed, *and* (2) that the attorney was consulted in furtherance of that crime or fraud. Petition at 13-14.

Gottlieb's argument focuses on the purported prima facie evidence that a crime was committed by SGS and Senft. He continues to ignore the point that, even if a

crime was committed relating to SGS, there was no evidence that Cadwalader was consulted to further that crime. Unless this requirement is satisfied, the crime-fraud exception is inapplicable. *See In re International Systems and Controls Corporation Securities Litigation*, 693 F.2d 1235, 1242 (5th Cir. 1982); *accord In re John Doe Corp.*, 675 F.2d 482, 491 (2d Cir. 1982).

As to the first element of the test, Gottlieb's reliance on Senft's conviction on the conspiracy count of the indictment is misplaced. *See* Petition at 14-15. Gottlieb notes that Joseph Antonucci, a defendant in the criminal case, sought to have his conviction on the conspiracy count overturned because *he left SFI before SGS was formed.* The Second Circuit in *United States* v. *Senft* affirmed Antonucci's conviction on the conspiracy count, concluding that the evidence was sufficient to support a jury determination that a *single* conspiracy existed. Contrary to Gottlieb's argument, this ruling does not require the conclusion that a crime relating to SGS was committed. Rather, the Second Circuit's opinion compels the conclusion that the only conspiracy the jury reasonably could have found on Count 1 of the Indictment related to SFI, and not to SGS. *See* Brief in Opposition, Appendix D. The Second Circuit noted that the jury was instructed to *disregard* evidence concerning SGS in determining Antonucci's guilt. Brief in Opposition, Appendix D at 19a.

Thus, the only conclusion that can be reached from Antonucci's conviction on the conspiracy count by a jury instructed not to consider any evidence relating to SGS, is that the jury found that Antonucci was part of a single conspiracy involving *SFI—not SGS.*[4] Brief in Opposition at 6; Petition at 2-3. Thus, there was no basis

[4] As previously shown (Petition at 3), this view of the jury's verdict is also supported by the fact that there was no conviction on *any* count relating to the SGS limited partners, including the one relating to Carr's investment.

for the conclusion below that the conspiracy conviction necessarily involved a finding of a crime relating to SGS.

In his brief to this Court, Gottlieb raises for the first time a claim that he has made a prima facie showing of a crime or fraud because SGS offered 150 limited partnership interests for sale within California without qualifying them, as plaintiff claims was required by Section 25110 of the California Corporations Code. This belated proffer of a different "fraud," devoid of evidence or citation in the record to establish it, is not a prima facie showing. It was never raised in the courts below and is certainly not so "plain or apparent" as to warrant this Court's consideration. *New York Dock Co.* v. *Steamship Poznan*, 274 U.S. 117, 123 (1927).[5] In this case, neither Gottlieb (nor Carr) is maintaining any action on behalf of the partnership, nor were they acting as trustees for the partnership. *See Weil* v. *Investment Indicators, Research & Management, Inc.*, 647 F.2d 18 (9th Cir. 1981) (*Garner* inapplicable where shareholder action is not a derivative suit).

Gottlieb contends that no citation of authority is necessary to apply this inapplicable theory to this action involving a limited partner's attempt to obtain disclosure of privileged communication between the general partner, the partnership and its counsel. No authority is offered because none is available. Moreover, the rationale of *Garner* v. *Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970), *cert. denied*, 401 U.S. 974 (1971), has been rejected by at least one court which noted that the so-called share-

[5] Relying on *In re Sentinel Financial Instruments*, 553 F. Supp. 71, 76 (S.D.N.Y.), *aff'd mem.*, 714 F.2d 113 (2d Cir. 1982), *cert. denied*, 459 U.S. 1208 (1983) and *In re Sentinel Government Securities*, 530 F. Supp. 793 (S.D.N.Y.), *petition for mandamus denied*, 697 F.2d (2d Cir.) *cert. denied*, 456 U.S. 977 (1982), Gottlieb urges that privilege claims similar to those asserted by Cadwalader were rejected in the criminal case. Neither of those decisions discuss the crime-fraud exception and in neither of those actions were documents of Cadwalader at issue.

holder/fiduciary exception may undercut the very purpose of the privilege and lead to less, rather than more, open disclosure:

> The *Garner* problem is perhaps that the shareholder or other owed a duty of trust becomes too readily and artificially recognized as the "client" for purposes of privilege.
>
> Although corporate management is expected to act ultimately for the shareholder's benefit, a hasty resort to *Garner* concepts will confuse who corporate counsel's clients realistically are, and ignore the genuine need of management in the ordinary course for confidential communication and advice.

Shirvani v. *Capital Investing Corp., Inc.*, 112 F.R.D. 389, 390-91 (D. Conn. 1986).

C. The Joint-Client Exception is Inapplicable

Cadwalader has demonstrated that the so-called joint-client exception relied upon by the district court did not justify disclosure because Gottlieb was never a client of Cadwalader. Cadwalader has also shown that Carr, as a limited partner, was not in any confidential relationship with Cadwalader or the partnership. Petition at 11-12. Gottlieb now argues that the attorney-client privilege is inapplicable when suit is brought against a fiduciary.

This argument is equally inapplicable to any attempt by Gottlieb to obtain documents. Gottlieb was not a partner in SGS and neither the partnership nor Cadwalader owed him any fiduciary duty. In addition, none of the cases relied upon by Gottlieb relate, even remotely, to a situation such as this, where a limited partner has brought an action against the general partner, the partnership and the partnership's attorney. The majority of cases adopting the exception now urged by Gottlieb, (which has never been recognized by this Court). applied it in shareholder derivative actions, where the shareholder sued on behalf of the corporation possessing the

privilege, or where the attorney was representing a trustee of an employee benefit plan.[6]

CONCLUSION

A writ of certiorari should be granted to review the decision of the Court of Appeals of the Ninth Circuit.

Respectfully submitted,

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[6] *See Garner* v. *Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970), *cert. denied*, 401 U.S. 974 (1971); *Panter* v. *Marshall Field & Co.*, 80 F.R.D. 718 (N.D. Ill. 1978); *Broad* v. *Rockwell International Corp.*, [1976-77 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,894 (N.D. Tex. 1977) (corporation's communication with its attorney available in shareholder derivative action upon showing of good cause); *Valente* v. *Pepsico, Inc.*, 68 F.R.D. 361 (D. Del. 1975); *Washington-Baltimore Newspaper Guild Local 35* v. *Washington Star Co.*, 543 F. Supp. 906, 909 (D. D.C. 1982) (attorney's communication with trustee of employee benefit plan not privileged because the trustee was acting solely for the beneficiaries).